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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 DOMINGO GERMAN MACAVILCA,

8 Plaintiff,

9 v.

10 EDWARD R. KANDLER, *et al.*,

11 Defendants.  
12

Case No. C08-5312 FDB/KLS

THIRD ORDER TO SHOW  
CAUSE

13 This civil rights action has been referred to the undersigned United States Magistrate Judge Karen  
14 L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Before the Court is  
15 Plaintiff's response to this Court's Second Order to Show Cause, and a proposed Amended Complaint.  
16 (Dkts. # 10 and 11). Having carefully reviewed Plaintiff's response, proposed amended complaint, and  
17 balance of the record, the Court orders as follows:

18 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745  
19 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a  
20 complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before  
21 service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987) (*citing*  
22 *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).

23 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct complained of  
24 was committed by a person acting under color of state law and that the conduct deprived a person of a  
25 right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*,  
26 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section  
27 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
28 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9<sup>th</sup> Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

1 Plaintiff must also allege facts showing how individually named defendants caused or personally  
2 participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.  
3 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory  
4 responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 n.58  
5 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v. Palches*, 665  
6 F.2d 965 (9th Cir. 1982).

7 Although complaints are to be liberally construed in a plaintiff's favor, conclusory allegations of  
8 the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the  
9 court can liberally construe plaintiff's complaint, it cannot supply an essential fact an inmate has failed to  
10 plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th  
11 Cir. 1982)).

12 On July 25, 2008, the Court granted Plaintiff leave to file an amended complaint so that he could  
13 properly set forth his claim that his "religious diet" of the past four years had been changed. (Dkt. # 9, p.  
14 1). The Court ordered Mr. Macavilca to file an amended complaint naming only the individual defendant  
15 or defendants who he alleges caused him harm related only to his claim that he had been denied his  
16 religious diet.

17 Mr. Macavilca filed a Response to New Order and Travers seeking "ten billion dollars for  
18 "psychological and mental anguish" from defendants, and an injunction from various members of the  
19 Board of Immigration Appeals and the Bureau of Immigration to stay Plaintiff's removal. (Dkt. # 10).  
20 He also filed a motion requesting "permission to file a second amended complaint to remove some  
21 defendants from this lawsuit," with 281 pages of exhibits, the majority of which relate to his immigration  
22 case.<sup>1</sup> Plaintiff was previously advised that he may not challenge his detention in this Section 1983 case.

23 Plaintiff also filed an Amended Complaint, naming Edward R. Kandler, James Lee, Roger Pauley,  
24 Ben Maxwell, David Jennings, A. Neil Clark, Bernadette Nocerino-Doody, John P. Torres, Timothy S.  
25 Robbins, as Defendants (Dkt. # 11-8, pp. 1-5). Mr. Macavilca now claims that in July 2008 the warden  
26 denied his religious meal; that on July 1, 2008, he was denied medical assistance; he has been denied

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28 <sup>1</sup>The Court notes that included within these various exhibits are copies of detainee request forms  
relating to requests for a vegetarian diet. *See, e.g.*, Dkt. # 11-4, p. 8-11. However, the Court may not supply  
essential unpleaded facts.

1 legal copies and postage, and that he has been denied property and other benefits. *Id.*, p. 5. However, the  
2 Amended Complaint contains no factual allegations describing how any of the named defendants caused  
3 or personally participated in causing Plaintiff any of the harms he alleges that he suffered. Plaintiff  
4 should attach only those exhibits to his Amended Complaint that are relevant to the claims alleged  
5 therein.

6 Due to the deficiencies described above, the court will not serve the complaint. Plaintiff shall file  
7 an amended complaint **on or before October 10, 2008**, curing, if possible, the above noted deficiencies,  
8 or show cause explaining why this matter should not be dismissed. The amended complaint must carry  
9 the same case number as this one. If an amended complaint is not timely filed or if plaintiff fails to  
10 adequately address the issues raised herein, the Court will recommend dismissal of this action as frivolous  
11 pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28 U.S.C. § 1915(g).

12 Plaintiff is further advised that an amended pleading operates as a *complete* substitute for an  
13 original pleading. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9<sup>th</sup> Cir. 1992) (citing *Hal Roach Studios,*  
14 *Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9<sup>th</sup> Cir. 1990) (as amended), *cert. denied*, 506 U.S.  
15 915 (1992)).

16 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended  
17 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to  
18 Plaintiff.

19 Dated this 23 day of September, 2008.

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23 Karen L. Strombom  
24 United States Magistrate Judge  
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